

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES EDWARD CLAYTON,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

NOT FOR PUBLICATION

Case No. C-2014-720

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUL - 8 2015

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

LEWIS, JUDGE:

In 2004, Petitioner, James Edward Clayton, entered pleas of guilty to Count 1, second degree murder, in violation of 21 O.S.1981, § 701.8(1), and other crimes not relevant to this proceeding, in the District Court of Muskogee County, Case No. CRF-1982-579.¹ The Honorable Michael Norman, District Judge, accepted the pleas, found Petitioner guilty, and sentenced Petitioner to life imprisonment, concurrent with his sentences in other counts not before the Court.

Finding that Petitioner was denied an appeal of his 2004 guilty plea through ineffective assistance of counsel, the U.S. Court of Appeals for the

¹ Clayton's original guilty plea, entered while representing himself pro se, was effectively set aside when a federal district court granted him a conditional writ of habeas corpus in 2003, finding he had been unconstitutionally forced to choose between self-representation and going to trial with an ineffective lawyer. The extended history of collateral proceedings in this case is recounted in *Clayton v. Jones*, 700 F.3d 435 (10th Cir. 2012).

Tenth Circuit granted a conditional writ of habeas corpus directing that the State afford Petitioner an appeal out of time from his guilty plea, or release him. *Clayton v. Jones*, No. 11-7000 (10th Cir., February 26, 2013)(Unpublished). This Court then granted an appeal out of time, and Petitioner filed a motion to withdraw his plea in district court.

The district court granted an evidentiary hearing on the motion. Petitioner and his plea counsel gave testimony at the hearing. The district court subsequently entered a written order denying Petitioner's motion to withdraw his plea. Petitioner now appeals the following propositions of error in a brief filed by his retained counsel.

1. Clayton's plea was not knowing and voluntary because trial counsel was ineffective in providing erroneous advice concerning the sentence range;
2. The factual basis presented at the plea hearing was insufficient to support a proper plea of guilty;
3. Clayton has served 33 calendar years for the crime which is excessive and must be modified;
4. Petitioner was denied effective assistance of counsel in the plea, sentencing, and motion to withdraw plea proceedings.

Counsel for the Petitioner has also attached a pro se brief, signed by the Petitioner, containing seven further assignments of error.²

² 1. The trial court failed to conduct a timely hearing on the denial of the right to appeal and withdraw plea which resulted in prejudice to Appellant and denied access to courts, due process, equal protection of law and effective assistance of counsel under the First, Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States;

We review the denial of a motion to withdraw a guilty plea for abuse of discretion, and that review is limited to: (1) whether the guilty plea was made

2. The trial court committed error when it considered "misinformation" in imposing sentence, resulting in prejudice to Appellant, and denied a jury trial on misinformation in sentencing, access to courts, due process, equal protection of law and effective assistance of counsel under the First, Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States;

3. The trial court committed error when it failed to hold a hearing and assign new counsel in 2004 when Appellant requested new counsel resulting in prejudice and denial of access to courts, due process, equal protection of law and effective assistance of counsel under the First, Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States;

4. The evidence is insufficient to support the conviction of murder, second degree, due to the failure to develop an adequate factual basis for the plea to the charge, in violation of the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States;

5. The Appellant did not have the assistance of counsel at the second part of the preliminary hearing [in 1983], had a conflict with counsel at the first stage of the preliminary hearing [in 1983] and was abandoned by counsel at a motion to exclude the preliminary hearing [in 2004], all critical stages of the proceedings in Oklahoma, depriving him of counsel, absent a knowing, voluntary, and intelligent waiver of counsel [on the record] and constructive denial of counsel on his murder, second degree charge, in violation of the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States;

6. The Appellant's plea in this case was not knowing, voluntary, and intelligent due to the misrepresentations of counsel Hoch which served as the basis of the plea that were not kept and depriving him of effective assistance of counsel and due process of law in violation of the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States;

7. The Appellant's conviction, judgment, and sentence in this case were secured when Appellant was unrepresented by counsel, represented by counsel with a conflict of interest, or by counsel that rendered ineffective assistance of counsel, all of which deprived Appellant of the effective assistance of counsel and due process of law in violation of the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States.

knowingly and voluntarily; and (2) whether the district court accepting the guilty plea had jurisdiction to accept the plea. *Cox v. State*, 2006 OK CR 51, ¶ 18, 152 P.3d 244, 251. The longstanding test for determining the validity of a guilty plea is “whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

In Proposition One, Petitioner claims that his plea was induced by plea counsel’s misrepresentations regarding the range of punishment, resulting in ineffective assistance of counsel. He argues that his decision to plead guilty was based on counsel’s inaccurate statement (he characterizes this as a tantamount to a promise by counsel) that he would be paroled within a short time after his guilty plea, and would be released before Christmas, 2004. He also claims that plea counsel incorrectly advised him that he could “discharge” his life sentence.

In *Hill v. Lockhart*, supra, the Supreme Court held that the deficient performance/prejudice test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) applies to challenges of guilty pleas based on ineffective assistance of counsel. The Court further stated that to prove *Strickland* prejudice, “the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill*, 474 U.S. at 59, 106 S.Ct. at 370.

Petitioner and plea counsel testified at the evidentiary hearing concerning counsel's advice before the plea. The trial court concluded that Petitioner was properly advised that the range of punishment was 20 years to life imprisonment. There is no credible evidence that Petitioner pleaded guilty because of counsel's prediction or promise that he would be paroled, or that he would eventually "discharge" his life sentence. The trial court's determination that the plea was knowing and voluntary is supported by the evidence, and denial of Petitioner's motion to withdraw the plea on this ground was not an abuse of discretion. Proposition One is denied.

Proposition Two argues that the factual basis for the guilty plea to second degree murder is insufficient. Petitioner admitted in his plea that while in flight from a robbery, he took a vehicle, was speeding, ran a stop light, and struck and killed the victim. We find that operating a vehicle in a reckless and unsafe manner while attempting to avoid apprehension for a felony is imminently dangerous conduct evincing a depraved mind and extreme disregard of a high risk of injury or death to others. Killing a person in these circumstances can be punishable as murder under Oklahoma law. 21 O.S.1981, § 701.8(1), (2). The factual basis is sufficient to support Petitioner's conviction. Proposition Two is denied.

In Proposition Three, Petitioner claims that his thirty-three (33) years of actual imprisonment on a life sentence is shockingly excessive compared to others convicted of second degree murder, and that he has served "day-for-day,

far and away more time than anyone in the history of Oklahoma” for his crime.”³ We review the sentence to determine whether it is within the statutory range, and will modify a sentence only where it shocks the conscience. *Rea v. State*, 2001 OK CR 28, ¶ 5, 34 P.3d 148, 149. We find no relief is warranted. Proposition Three is denied.

Petitioner argues in Proposition Four that he was denied effective counsel at the 2014 hearing on his motion to withdraw the plea. To obtain relief, Petitioner must show that counsel’s performance was deficient, and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). Prejudice in this context is a reasonable probability that, but for counsel’s errors, Petitioner would not have pleaded guilty and would have insisted on going to trial, or that the trial court’s ruling on his motion to withdraw the plea would have been granted. *Hill*, 474 U.S. at 59, 106 S.Ct. at 370.

In support of this claim, counsel for the Petitioner now points to his late entry into the case, tactical disagreements with Petitioner’s other retained counsel, and counsel’s failure to call two witnesses, Jerry Seitz and Clifford Brown, whose testimony supported Petitioner’s claim that plea counsel

³ Petitioner’s claim of having served the longest sentence for second degree murder in state history conflicts with public online offender records of the Department of Corrections, which indicate that Mark Osterloh and Owen Swaim, co-defendants sentenced to life for second degree murder in the commission of robbery, remain in prison after almost 39 years. *Swaim v. State*, 1977 OK CR 295, 569 P.2d 1009; *Osterloh v. State*, 1978 OK CR 64, 580 P.2d 1008. (Oklahoma Dept. of Corrections, Offender Search, <http://www.ok.gov/doc/Offenders/index.html>, accessed May 11, 2015).

predicted that Petitioner would be granted parole soon after his plea and be home with his family.⁴ We find that Petitioner has failed to show any reasonable probability that, but for counsel's alleged errors and omissions, the outcome of either Petitioner's plea or his motion to withdraw his plea would have been different. Proposition Four is denied.

Petitioner has submitted seven additional assignments of error in a pro se brief attached to retained counsel's brief on certiorari. Counsel has properly certified these arguments in compliance with Rule 3.4(E), *Rules of the Court of Criminal Appeals*, 22 O.S.Supp.2014, Ch. 18, App. We address these pro se assignments of error to the extent necessary to a full disposition of this matter.

In Assignment No. 1, Petitioner argues the initial denial of his right to appeal and subsequent delays have prejudiced his substantial rights. We disagree. The denial of an appeal from Petitioner's plea of guilty was properly remedied by granting him an appeal out of time to present his request to withdraw the guilty plea. *Dixon v. State*, 2010 OK CR 3, ¶ 4, 228 P.3d 531, 531-32. Petitioner has not shown that delay prejudiced his ability to challenge the voluntariness of his plea or assert possible defenses. The record affirmatively shows that Petitioner has no defense, and that his plea was a knowing, voluntary, and intelligent choice. This assignment requires no relief.

⁴ The affidavits of Seitz and Brown, presented in Petitioner's federal habeas corpus proceedings, are part of the record filed in connection with this appeal.

In Assignment No. 2, Petitioner claims that his sentence was improperly enhanced with invalid prior convictions. The plea and evidentiary hearing transcripts indicate that Petitioner has as many as seven (7) prior convictions, some of which may have been reversed or vacated. Petitioner admitted in his plea that he committed murder after two prior felony convictions. His current argument that he has no prior felony convictions to enhance his sentence is frivolous. This assignment is denied.

In Assignment No. 3, Petitioner claims that the trial court erred when it failed to hold a hearing on his written requests for new counsel before the 2004 plea. Petitioner has not shown that he persisted in his requests at the plea, indicating that he waived further action on these written requests. Petitioner met with counsel for at least two hours prior to the plea, and entered the plea without voicing further objections. No relief is required. *Johnson v. State*, 1976 OK CR 292, ¶ 33, 556 P.2d 1285, 1294 (request to discharge appointed counsel for delay, disagreement, or personality conflict is properly denied).

In Assignment No. 4, Petitioner repeats his claim that the factual basis of his plea is insufficient to support a conviction for second degree murder. We rejected this argument in Petitioner's Proposition Two. This assignment is therefore denied.

In Assignment No. 5, Petitioner argues that he was denied counsel at preliminary examination due to a conflict of interest, and later abandoned by counsel in other critical stages of preliminary proceedings. Petitioner waived

these challenges to the effectiveness of counsel, and other defects in preliminary proceedings, by entering his plea of guilty. *Darnell v. State*, 1981 OK CR 1, ¶ 8, 623 P.2d 617, 620. This assignment is denied.

In Assignment No. 6, Petitioner repeats his claim that counsel's alleged promises or predictions that he would be granted parole and released shortly after entering his plea rendered the plea involuntary. We rejected this identical claim in Proposition One. This assignment warrants no relief.

In Assignment No. 7, Petitioner again argues that his previous counsel have rendered ineffective assistance or represented conflicting interests throughout the proceedings. Again, Petitioner has failed to show that counsel rendered deficient performance, or that an actual conflict of interest adversely affected their performance, in any proceedings relevant to this appeal from the denial of the motion to withdraw his 2004 guilty plea. This assignment is denied.

DECISION

The Petition for the Writ of Certiorari is **DENIED**. The Judgment and Sentence of the District Court of Muskogee County is **AFFIRMED**. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF MUSKOGEE COUNTY
THE HONORABLE MICHAEL NORMAN, DISTRICT JUDGE**

APPEARANCES AT TRIAL

AL HOCH (PLEA)
803 ROBERT S. KERR
OKLAHOMA CITY, OK 73106

FRED P. GILBERT (MOTION)
406 S. BOULDER, STE. 830
TULSA, OK 74103

JAMES L. HANKINS
929 N.W. 164TH ST.
EDMOND, OK 73013

NATHAN HENDRICKSEN
428 COURT ST.
MUSKOGEE, OK 74401

ATTORNEYS FOR DEFENDANT

LARRY MOORE
ASST. DISTRICT ATTORNEY
220 STATE ST.
MUSKOGEE, OK 74401

ATTORNEY FOR THE STATE

OPINION BY LEWIS, J.
SMITH, P.J.: Concurs in Results
LUMPKIN, V.P.J.: Concurs in Results
JOHNSON, J.: Concurs
HUDSON, J.: Concurs

APPEARANCES ON APPEAL

JAMES L. HANKINS
929 N.W. 164TH ST.
EDMOND, OK 73013

ATTORNEY FOR PETITIONER

NO RESPONSE NECESSARY